

**Thalbo Corporation and G.B. Motel Management
d/b/a Ramada Inn Newburgh and Paulette
DiMilta. Case 2-CA-24990**

July 13, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On December 7, 1993, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Thalbo Corporation and G.B. Motel Management d/b/a Ramada Inn Newburgh, Newburgh, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²The judge in his decision erroneously stated that Paulette DiMilta's January 23, 1991 conversation with employees concerning her union sympathies and the upcoming election occurred in the hotel lobby; in fact, the record indicates it occurred in the dining room. This error, however, does not affect the judge's ultimate findings or conclusions.

In adopting the judge's finding that the Respondent's refusal to recall DiMilta violated the Act, we find it unnecessary to rely on the judge's conjecture that the Respondent anticipated a close result in the election.

Rita C. Lisko, Esq., for the General Counsel.
Rochelle J. Auslander, Esq., for the Respondent.
Michael H. Sussman, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newburgh, New York, on various days in May, July, and September 1993.

The charge in Case 2-CA-24990 was filed by DiMilta on March 18, 1991. She alleged that the Company, on or about

February 7, 1991, refused to recall her from sick leave or rehire her because of her union activities. That charge was subsequently joined with a number of other charges in a consolidated complaint which issued on July 31, 1992.

On July 13, 1993, two of the Charging Parties, but not DiMilta, entered into settlement agreements. In this regard, United Food and Commercial Workers, Local 1262, a/w United Food and Commercial Workers International Union, AFL-CIO agreed to withdraw the charges which it had filed against the Respondent in Cases 2-CA-24726, 2-CA-24926, and 2-CA-25217 and Jacqueline Hardaway agreed to withdraw the charge she had filed in Case 2-CA-24954. In consideration, the Respondent agreed to make certain payments to the various employees alleged to have been discriminated against (in some cases on an installment plan) and also agreed to reinstatement as soon as jobs became available.¹ Also, the Respondent agreed to post a notice in its facility stating that it would not engage in the types of conduct which it was alleged to have committed.

As the settlements described above, substantially remedied the allegations contained in the respective charges, I severed those cases from the charge filed by DiMilta, approved the settlements over the objections of the General Counsel, and approved the withdrawal of the respective charges on condition that all the terms of the settlements were thereafter carried out.² At the same time, I notified all parties that inasmuch as a great deal of evidence already had been taken prior to my approval of the settlements, I would not ignore that evidence which could be relied on by any party in relation to the remaining allegations involving DiMilta.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is also concluded based on Respondent's answer to the complaint that Thalbo Corporation and G.B. Motel Management Inc. constitute a single-integrated enterprise and are a single employer within the meaning of the Act.³

¹In the case of Jacqueline Hardaway who waived reinstatement, she agreed to accept the sum of \$5000. In the case of the other 11 alleged discriminatees, the Company agreed to pay a total of \$60,000 and to place them on a preferential hiring list. (To date, it appears that all have been offered reinstatement to their former jobs.) As the whereabouts of two were unknown, the Union agreed to use its best efforts to locate these individuals (Gloria Rosas and Patricia Balbuena) and the parties agreed that if they were not found within 1 year, the amounts allocated to them would be redistributed to the other nine discriminatees.

²Having been notified that the terms of the settlement in Case 2-CA-24945 (involving Jacqueline Hardaway) had been fully complied with, I approved the withdrawal of her charge and dismissed that portion of the consolidated complaint by Order dated September 30, 1993.

³The Respondent admits that Thalbo and G.B. have common officers, owners, directors, management, and supervision. It also admits that they formulate and administer a common labor policy, share

Continued

II. ALLEGED UNFAIR LABOR PRACTICES

Paulette DiMilta began her employment at the hotel in April 1985 as a bartender and most of her experience at this employer has been in that job category. She did, however, work at other jobs from time to time. For example she spent some time as a hostess in the dining room, worked for a brief time at the front desk, and also worked for about 3-1/2 months as a secretary in the banquet sales office. The Company agrees that she was a good worker. Indeed, the owner, Eugene Boleslawski, testified that he liked Paulette as a worker and had no objection to her returning to work.

According to Rose Birch, employed as a waitress, there was some talk about unionizing in May or June 1990 among herself, Paulette DiMilta, and several other employees including Gaspar in maintenance and Raymond who was employed at the front desk. This did not result in any action at that time.

Rose Birch states that it was not until mid-October 1990 that organizing activity began for the United Food and Commercial Workers, Local 1262, a/w United Food and Commercial Workers International Union, AFL-CIO (Local 1262 or the Union).

By this time DiMilta was no longer actively employed at the hotel as she left on July 12, 1990, because of a stomach ailment. At the time she left, DiMilta was employed as the day-shift bartender. She worked from Monday to Thursday from about 11 a.m. to 7 p.m.

In early October 1990, the Union obtained authorization cards from the hotel's employees, many of which were solicited by Rose Birch. Other employees who were active in the hotel on behalf of the Union were Rita Losinno (a waitress), Karen Williams (in housecleaning), Raymond, and Gaspar.

On October 25, 1990, the Union filed a petition for an election in Case 2-RC-20971. Thereafter, the Regional Director issued a Decision and Direction of Election on January 9, 1991, pursuant to which an election was conducted on February 7, 1991. The Union won that election after some challenged ballots were resolved, and on February 27, 1991, it was certified as the exclusive collective-bargaining representative of certain employees. Subsequently, bargaining commenced, albeit the parties had not reached an agreement at the time of this hearing.

During the months from October 1990 to January 1991, the Union held a number of meetings with the employees. Although not working at the hotel during this period, DiMilta did attend some of these meetings, at least two of which were held at a restaurant located about one-half mile down the same road from the Respondent. It is probable that management was aware that DiMilta attended these meetings. For one thing, DiMilta drove to the meetings and had a distinctive white convertible car with a vanity plate. For another, there was testimony that Boleslawski was aware of at least one of these meetings and that the children of General Manager Mary Conte were invited to some of these meetings.

At the time that the union activity was occurring, the Respondent's general manager was Mary Conte and there is no

common premises and facilities, interchange personnel, provide services, and make sales to one another.

doubt that she reacted with extreme aversion to the organizing activity.⁴

Dale Walsh, who was employed as the banquet manager, credibly testified that on one occasion when the union people were handing out pamphlets to employees, Conte came into Walsh's office "in a fit" and said that this was a "great tragedy" and that she "couldn't take it." Walsh testified that Conte said that if the Union came in, she would quit. Walsh testified that one of her best waitresses, Rita Losinno, was very active for the Union and that Mary Conte who was aware of Losinno's union activity, was constantly pushing Walsh to write Losinno up for any infractions, including infractions that were not Losinno's fault. She states that although she told Conte that Losinno was a great employee, Conte wanted to have her fired. Walsh further testified that on February 7, 1991, after the ballots were counted, Mary Conte went storming down the hall in tears and slammed the door to her office. She states that on February 8, 1991, Conte came into her office jubilant about the discharge of Rose Birch (one of the union activists); stated that this made her day; and said that Losinno was next. Finally, Walsh testified that at some point after the election, Conte told her that she would like to stall the negotiations and that if they were stalled long enough there wouldn't be any employees left among the group that had voted for the Union.

As noted above, Paulette DiMilta ceased working at the hotel on July 12, 1990, because of a stomach ailment. While contending that DiMilta was out on "sick leave," I don't think that the Company had a specific sick leave policy of the type where employees were guaranteed their jobs back immediately on recovering from their illnesses even if another employee had been hired in their place. Rather, it is my understanding that on recovery, there was a high probability that they would be returned to work as there was a large degree of turnover and jobs were constantly becoming vacant.

On July 16, 1990, DiMilta wrote to the Company stating that she had been advised by Dr. Cohen to take 8 weeks off and that she expected to return around September 8, 1990. In September 1990, DiMilta wrote to Conte, stating in pertinent part that she would not be able to return to work before December 1990. (In both cases, DiMilta attached notes from her doctors.) In addition, DiMilta telephoned Conte in September 1990 to tell her about her situation. In this regard, Conte stated in her affidavit:

4. Paulette called a few times & wrote letters. Her doctors said she could not come back to work at that point (last year). I spoke to her on the phone . . . last July or August. She said she would be coming back. I said, just let us know when. It was my intention to hire back. She was receiving some kind of disability, workers comp until February 1, 1991. She continued to be

⁴ Conte, who made the decision not to recall DiMilta and who was the principal company official at the time of the union organizing campaign, was subpoenaed by the Respondent as she was no longer employed by the Company at the time of the hearing. She did not comply and the Respondent moved to have the subpoena enforced. When it became apparent that Conte was not going to be available due to a psychiatric condition, the parties agreed that three affidavits which she had given during the investigation should be introduced into evidence in lieu of her testimony.

on the payroll (although she wasn't receiving any salary). She claimed her illness was stress related which is why she got workers comp.

5. I don't believe she was ever scheduled to work after July 1990 although I am not sure. I do recall a conversation (by phone) around 9/90. I may have said, we'll always have a job opening, although I did not specify the position.

On November 28, 1990, DiMilta's doctor gave her a letter stating that she would not be able to perform her normal job duties for the next 2 months.

In the meantime, the Company hired a new bartender, Rosemary Sheridan, to take DiMilta's place.⁵

In or about the third week of January 1991 (a couple of weeks after the Regional Director had issued the Decision and Direction of Election) DiMilta received permission from her doctor to return to work. She called Conte by phone and made an appointment to meet with her on January 23 to talk about returning to work.

On January 23, 1991, DiMilta arrived at the hotel for her appointment but learned that Conte would not be available because her father had died. She testified that while in the lobby, she spoke with Boleslawski who asked when she was coming back to work. According to DiMilta, when she told Boleslawski that she hoped to return soon, he said, "good, we've missed you." Before leaving, DiMilta openly expressed her feelings about the Union in the presence of various people standing around the lobby. According to Rose Birch:

And Paulette, being Paulette, was very loud and boisterous and letting everybody know how she felt about the union and trying to get everybody to vote . . . and telling them all the things that she had gotten through her husband's union. And, you know, just generally speaking to whoever was within earshot that she was for the union.

According to DiMilta, she was contacted by Conte who told her that she needed a note from the doctor stating that she was able to return to work. As Dr. Cohen was on vacation, DiMilta was unable to get the note until February 4, 1991, and she called Conte in advance to set up an appointment after obtaining the note.

Having obtained the doctor's note (dated February 4, 1991), DiMilta called Conte on several occasions during February 5 and 6. On each occasion, Conte was not available and did not return DiMilta's calls.

February 7, 1991, was the day of the election and DiMilta showed up with the intention of voting. When she attempted to cast her ballot, she was challenged by the Company's election observer who stated that the grounds for the challenge was that DiMilta had been fired and would never be recalled. This, in light of her previous conversations with Conte and Boleslawski came as quite a shock to DiMilta.

⁵In her brief, the General Counsel asserts that Rosemary Sheridan was hired on a temporary basis and cites to p. 1 of Mary Conte's affidavit dated March 28, 1991. I think that the General Counsel has, perhaps, misread the affidavit which states: "I don't know if she [Sheridan] was hired on a temporary basis or not."

On February 8, 1991, DiMilta sent a certified letter to Boleslawski pursuant to which she requested reinstatement and enclosed her doctor's notes indicating that she could return to work. She also attempted to call Conte on three or four occasions during that week but received no response. In early March 1991, DiMilta attempted to send another certified letter to the Company, but this was returned unopened.

In September 1991, Rosemary Sheridan (the replacement bartender) left the Company and DiMilta went to the hotel to fill out a new job application for that position. The Respondent did not respond.

The parties stipulated that during the period from July 1, 1990, to September 28, 1993, there were 15 bartenders and 4 banquet and sales secretaries who were hired and/or terminated. At no time after February 7, 1991, was any job offered to Paulette DiMilta.⁶

III. ANALYSIS

Pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), if the General Counsel makes out a prima facie showing to support an inference that protected conduct was a motivating factor in a discharge or any other adverse action taken against an employee, the burden shifts to the employer to demonstrate "by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct."

There is no question but that Mary Conte had substantial animus against employees who supported the Union. The credible testimony of Dale Walsh (a comanager) indicates that Conte's response to the union organizing activity bordered on being obsessive and that she expressed her desire to discharge employees who supported the Union.

The problem with DiMilta's case is that for the entire period that the Union was organizing except for a couple of weeks before the election, she had neither been working at the hotel nor around its premises.

Nevertheless, only a short time before the election was scheduled to be held, DiMilta asked for her job back and on her arrival at the hotel lobby on January 23, 1991, openly expressed her hopes of returning to work and expressed her support for the Union. Given this event, it is quite conceivable that with a close election anticipated by the Company, Conte, who had earlier assured DiMilta of being rehired, decided to change her mind and eliminate DiMilta from the roster of eligible voters, thereby eliminating a yes vote for the Union.

The Respondent asserts that DiMilta quit her employment and that as of February 1991, there was no position open for her.

In my opinion, the evidence shows that DiMilta clearly did not quit her employment. Additionally, while there may not have been a position immediately open to DiMilta when she indicated that she was ready to return to work, the evidence shows that Conte, no later than February 7, 1991, had made up her mind to refuse to reinstate DiMilta either to her old job as bartender or to any other job that she was qualified

⁶The Respondent intimated that Conte thought about offering DiMilta a maid's position in the housekeeping department. It is clear however, that no such job (even assuming it was suitable) was ever offered to DiMilta.

to do. As such, there was a de facto discharge of DiMilta in February 1991 when the Company simply ignored her requests and inquiries about being reemployed.

The person who made the decision not to reinstate DiMilta was Mary Conte. As she was not available to testify, her evidence was presented in the form of three affidavits which she had given during the investigation. In my opinion, an examination of the reasons she asserted for not reinstating DiMilta were contradictory, were contrary to the other evidence in this case, and can only be construed as pretextual.

In her affidavit dated March 1, 1991, Conte acknowledged that as of July or August 1990, she intended to rehire DiMilta. She also acknowledged that as late as January 1991, she made an appointment for DiMilta to come to the hotel to talk about reinstatement. As noted above, that appointment for January 23, 1991, was not kept because Conte's father died. In this affidavit, Conte asserts that (1) she never heard from DiMilta after January 23; (2) that DiMilta was never formally fired; and (3) that DiMilta could apply if there was another opening as she was a good worker who worked at the hotel for a long time.

Conte's September 19, 1991 affidavit tells a completely different story. Here, Conte concedes that DiMilta's separation record states that DiMilta would not be rehired. According to Conte, the reason for this notation was "because it is my policy for this hotel (which) has a bad track record for rehiring employees in that they do not always show up for work or there are other problems." Conte states that the reason DiMilta was not recalled when a bartender position became open (Sheridan left) was because of her policy never to rehire employees who leave or are discharged, except for people on leaves of absence.

The evidence shows that the Company has never had a policy of not recalling employees who have either left or even who have been discharged. This was acknowledged by Respondent's witnesses Eugene Boleslawski, Donna McLean, and Virginia Armour. Indeed Conte's statement in her second affidavit is directly contradicted by her first affidavit which stated that as of the summer of 1990, she intended to rehire DiMilta. Thus, the reason stated by Conte in her September 1991 affidavit for her refusal to recall DiMilta is demonstrably false.

The fact is that as of the summer of 1990 and even by January 1991, Conte was ready and willing to reinstate DiMilta, if not immediately, then to the next available position. By February 7, 1991, Conte changed her mind so that she now was unwilling to even acknowledge DiMilta's calls or letters. As the only intervening event was DiMilta's visit to the premises on January 23, 1991, and her openly announced support for the Union on that occasion, it is reasonable to conclude that Conte, facing a close election, decided to eliminate DiMilta as a prounion voter by claiming that she was no longer employed and had no reasonable expectancy of return. I therefore conclude that by deciding not to recall DiMilta, the Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By refusing to reinstate or offer to reinstate Paulette DiMilta because of her support for the Union, the Company has violated Section 8(a)(1) and (3) of the Act.

2. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily refused to reinstate employee Paulette DiMilta, must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from such time as a position would have been available to her,⁷ to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Thalbo Corporation and G.B. Motel Management d/b/a Ramada Inn Newburgh, Newburgh, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recall, reinstate, rehire, or otherwise discriminating against any employees because of their union activities or support.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Paulette DiMilta immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful refusal to reinstate Paulette DiMilta and notify her, in writing, that this has been done and that the action will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

⁷In compliance, in order to determine a date when a position would have been available to DiMilta, inquiry could be made of Rosemary Sheridan as to whether she was originally hired on a temporary or permanent basis. Also, inquiry might be made as to whether and when any job openings occurred for secretarial positions in the banquet sales department.

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Post at its facility in Newburgh, New York, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recall, reinstate, rehire, or otherwise discriminate against any employees because of their union activities or support.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Paulette DiMilta immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL remove from our files any reference to the unlawful refusal to reinstate Paulette DiMilta and notify her, in writing, that this has been done and that such action will not be used against her in any way.

THALBO CORPORATION AND G.B. MOTEL
MANAGEMENT D/B/A RAMADA INN NEW-
BURGH